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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA ROGERS, et al., Defendants and Appellants.	B264208 (Los Angeles County Super. Ct. No. BA392551)

APPEALS from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed in part; reversed in part.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant Joshua Rogers.

Corona & Peabody, Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant Melissa Soto.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Viet H. Nguyen, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendants and appellants Joshua Rogers and Melissa Soto guilty of first degree murder (Pen. Code, § 187),[1] and found true as to each defendant the special circumstances that the murder was committed while defendants were engaged in a robbery (§ 190.2, subd. (a)(17)(A)) and a burglary (§ 190.2, subd. (a)(17)(G)). The jury found not true the allegation that Rogers personally and intentionally discharged a firearm, which proximately caused great bodily injury or death (§ 12022.53, subd. (d)).[2]

Defendants were sentenced to life in prison without the possibility of parole (LWOP). The trial court imposed restitution fines of $7,500 as to each defendant. Although the trial court did not impose parole revocation fines, the abstracts of judgment reflect $7,500 parole revocation fines as to both defendants.

Rogers and Soto both contend that insufficient evidence supports the robbery and burglary special circumstances findings, and that the parole revocation fines do not reflect the trial court's oral pronouncement and are unauthorized.

Rogers concedes that his conviction for first degree murder is supported by substantial evidence, but contends he was prejudiced with respect to the robbery and burglary special circumstances findings because the trial court erroneously admitted statements by codefendant Rubio. He joins in Soto's arguments to the extent that they benefit him pursuant to California Rules of Court rule 8.200 and *People v. Smith* (1970) 4 Cal.App.3d 41, 44.

Soto separately contends: (1) the prosecution failed to show that it exercised reasonable diligence to produce two witnesses in violation of her constitutional right to confrontation; (2) her trial counsel provided ineffective assistance by failing to secure the attendance of two key witnesses or to establish due diligence in his attempts to locate them; and (3) she was prejudiced by cumulative errors at trial.

The Attorney General concedes the parole revocation fines cannot be imposed on

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] Defendants were first tried with codefendants Stuart Rubio and Heriberto Valenzuela, who were found guilty of murder. The jury could not reach a verdict as to Rogers and Soto. Their retrial is the subject of this appeal.

an LWOP sentence and must be stricken, but otherwise contests defendants' substantive challenges.

We vacate the robbery and burglary special circumstances findings as to Soto for lack of substantial evidence, and order that Soto be resentenced to 25 years-to-life in state prison. We further order that Rogers's abstract of judgment be corrected to strike the parole revocation fine. In all other respects, the judgments are affirmed.

FACTS[3]

Murder Scene and Physical Evidence

At 3:12 a.m. on December 10, 2013, a 9-1-1 caller reported gunshots at Robert Hendrix's home on West Trails in Lakeview Terrace. Police discovered Hendrix dead in his bedroom, with two gunshot wounds to the chest. Hendrix's home was in disarray, but there were no signs of forced entry. There were two safes in the bedroom, one which was open and empty, and a second that was locked. A .38 caliber bullet was lodged in the dry wall of the closet, and two .22 long caliber rifle cartridge live rounds and two .22 caliber expended cases were also recovered from the bedroom. There were bullet strike marks in the bedroom from .38 caliber and .22 caliber firearms. A laundry bag, watch, clock, and jewelry were strewn on the floor by the doorway.

Based on the bullet trajectories, the coroner opined that Hendrix was likely leaning forward facing his assailant(s) when two shots were fired from at least two feet away. One of the bullets recovered from Hendrix's body was fired from a .38 special or a .357 Magnum revolver, and the other was fired from a .22 long rifle.

A tennis shoe with blood on it was recovered at the edge of some bushes about 130 feet away from Hendrix's property line. The blood was matched to Hendrix. DNA found on the inside of the tennis shoe was later matched to former codefendant

[3] The facts are as presented by the prosecution. The defense did not present any evidence.

Valenzuela.

Text Messages

A cell phone recovered from Hendrix's bedroom contained contact information for Rubio, Valenzuela, and Soto. The number associated with Soto was a T-Mobile cell phone registered to her mother. Service for Soto's phone was established in April 4, 2011, and disconnected on December 12, 2011, by customer request.

Soto and Hendrix exchanged several texts the night of December 9, 2011, and the early morning of December 10, 2011, as established by Hendrix's phone and phone records from T Mobile:

8:00 p.m., Soto: "What's up? Where you at?"

9:28 p.m., Soto: "Hello."

9:33 p.m., Hendrix: "Still at Adams."

9:34 p.m., Soto: "Oh, I see. Do you have any on you?"

9:34 p.m. - 9:36 p.m.,[4] Hendrix: "So, it's just my stuff you want."

9:36 p.m., Soto: "Were you planning on heading home soon or not sure?"

9:36 p.m. - 9:40 p.m., Hendrix: "I am very soon."

9:36 p.m. - 9:40 p.m., Soto: "Yep, pretty much. No, but I need to smoke too. And I haven't."

9:36 p.m. - 9:40 p.m., Soto: "Was that a ya or no."

9:40 p.m., Hendrix: "I will call you right when I leave."

9:40 p.m. - 9:43 p.m., Soto: "Okay. So I gotta to plan on going to you."

9:43 p.m., Soto: "More or less how long so I know"

9:44 p.m., Hendrix: "Yes."

10:43 p.m., Soto: "Are you heading home"

11:03 p.m., Soto: "Rob, your phone's off. I guess it died or something, but I need

[4] Where a time range is given, the record specifies the order in which texts were sent, but does not specify the exact text time.

to get something, so I guess I'll hope you're home."

12:45 a.m., Hendrix: "I'm home. Sorry, my phone died."

12:48 a.m., Soto: "It's cool. That's what I figured. Anyhow, I'll see you in a few. Okay."

Nicholas Gutierrez

Nicholas Gutierrez was driving up West Trails near his home between 2:00 a.m. and 3:00 a.m. on the night of the murder. Gutierrez saw a male wearing dark clothing and a hoodie running toward him. The man ran to a dark red four-door vehicle with its brake lights on, which was parked behind Gutierrez's car. The man got into the back seat, and the car drove down the hill. Gutierrez later identified a photo of Soto's red Saturn[5] as the car he had seen based on the taillights.

Devonne Sams

Devonne Sams was a methamphetamine user. Sams's roommate was a drug dealer, and their house was a hangout for methamphetamine users.

About a week before Hendrix was killed, Rubio told Sams he was going to steal money and drugs from someone in Lakeview Terrace and asked if she wanted to make some money by driving him there. She said she would think about it. Rubio called Sams on the night of the murder and asked her to pick him up from his house. When Sams arrived, Rubio and Valenzuela were waiting for her outside. Sams drove them to her house. Rubio told Sams to drive carefully because they were "strapped to the hill," which Sams understood to mean that they were armed with guns, although she never saw any weapons.

[5] The car was registered to Soto's mother.

When they arrived, Rubio showed Sams's roommate a sawed off shotgun.[6] After about a half an hour, Rubio asked Sams if she would drive him to the robbery again. Sams noticed that Soto and Rogers had come to her house uninvited.[7] She was annoyed because she did not know Soto and had not seen Rogers in years. She asked Rubio why Soto and Rogers were there, and he responded that he had invited them because "they" were going with him. Sams did not ask where "they" were going because she already knew. Soto, Rogers, and Valenzuela left shortly after that. Rubio once more asked Sams if she was going to drive him, but she said no, because there were "too many people involved." Rubio left about a minute later.

A few hours later, Rubio called Sams's roommate and asked her to pick him up from his house. When Sams and her roommate arrived, Valenzuela was waiting outside by himself, holding a white laundry bag. Sams asked where Rubio was. Valenzuela told her not to worry, and said they were just picking him up. When they dropped Valenzuela off at his house, Sams's roommate got out of the car and talked to him for a couple of minutes. Valenzuela left the laundry bag in Sams's car. Sams's roommate told her to put it in a dumpster behind an apartment complex. The bag smelled like bleach.

Several days to a week later, Sams and her roommate went to Rubio's house. Sams's roommate went into the house and came out with a small metal box that had a lock on it. Sams kept the box in her room under a chair for a week before Rubio came to get it. She did not open the box.

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[6] Sams testified that she did not know the difference between a rifle and a shotgun.

[7] Sams testified that Rogers and Soto were not present when Rubio showed off the shotgun, but she admitted she had previously testified and told police that Soto and Rogers were there at the time.

Brenda Urquidez[8]

Brenda Urquidez was a methamphetamine user who had been to Hendrix's home and purchased drugs from him several times. Urquidez knew Soto and Rogers, and described them as boyfriend and girlfriend. She said they had a child together. The night before the murder, Urquidez was at Rubio's house with approximately 15 other people, including Valenzuela, Rogers, Soto, and David Saracione, who had been staying with Rubio. Saracione angered Rubio at some point, so Rubio took his belongings, including a sawed off .22 caliber rifle, and kicked Saracione out of the house. Later that night, Urquidez noticed that Rubio, Valenzuela, Soto and Rogers had left Rubio's house.

Valenzuela returned a few hours later followed soon afterwards by Rubio, Soto, and Rogers. One of them was carrying a medium-sized wooden box that resembled boxes Urquidez had seen in Hendrix's house. Rogers was missing one of his shoes. He threw the other shoe away. Soto told "them" that "they" had to go and walked outside. Urquidez noticed that Rogers was carrying a full cloth grocery bag. Rogers hid Soto's red Saturn a few blocks away, and Urquidez drove Soto and Rogers home. When she returned, Valenzuela had left Rubio's house.

David Saracione[9]

Saracione saw Rubio with a .38 caliber revolver on the night Hendrix was murdered. Rubio took a .22 caliber sawed-off rifle from Saracione that same evening because Saracione owed him money or took something of his.

[8] Urquidez was unavailable at trial. Her prior testimony was read into the record.

[9] Saracione was unavailable at trial. His prior testimony was read into the record.

Barney Berrones

Barney Berrones knew Rubio in December 2011. He had seen Rubio with a .38 revolver prior to the murder. In early December 2011, Rubio and Phillip Acosta called Berrones several times and asked him to come to Rubio's house to pick up two guns and some items in a bag. Over several calls with Rubio and Acosta and an encounter with Acosta, Berrones was able to piece together that Rubio and a White guy, "Josh" or "Jeremy," robbed someone named "Rob" and Rob "didn't want to give his shit up, so they shot him . . . ." Acosta and Rubio told him that Josh "was down" and "had heart." At first, Berrones agreed to get the guns and other items, but then he changed his mind.

Sams later told Berrones that Valenzuela was the person involved in the robbery with Rubio. In an interview with police, Berrones said he was wrong about "Josh" or "Jeremy" being involved.

William Morgan

William Morgan knew Rogers, Rubio, and Hendrix in December 2011. Morgan was a drug dealer and heroin addict. Sometime between 2:30 a.m. or 3:00 a.m. on a night in December of 2011, he saw Rogers and Rubio parked behind his apartment complex. Both men looked "petrified" and Rogers told Morgan that they had gone to visit Hendrix to rob him, but the robbery had gone badly and they ended up shooting Hendrix. Morgan, who had experience in jail, advised Rubio and Rogers to "chill out," get rid of the evidence, and not tell anyone what happened. Rubio and Rogers left. In an interview with police, Morgan said that Rogers and Hendrix struggled over a gun, and it went off.

Cell Phone Calls

On December 9, 2011, between 8:15 p.m. to 11:18 p.m., there were 17 incoming and outgoing calls from Soto's phone. These calls utilized the cell towers which

provided service to Rubio's house, and included a call to Hendrix. Soto and Hendrix had exchanged numerous phone calls prior to December 10, 2011. Soto did not place any calls to Hendrix between the time of his murder on December 10, and December 12, 2011, when her phone service was disconnected.

On December 10, 2011, Soto and Rubio exchanged several calls and texts between 1:13 a.m. and 2:23 a.m. Four calls on Soto's phone that utilized the cell tower providing service to Hendrix's house were made between 1:44 a.m. and 1:49 a.m. Three calls to Rubio made from Soto's phone between 2:02 a.m. and 2:16 a.m. utilized cell towers located between Hendrix's house and Sams's house. Soto received a call from Rubio that utilized a cell tower near Sams's residence at 2:23 a.m. Soto's phone received another call at 3:15 a.m., which also used a tower near Sams's residence. At 3:45 a.m., Soto's phone received a call using the cell tower near Rubio's house.

Rubio received a call at 2:55 a.m. and made a call at 2:58 a.m. Both calls used a cell tower near Hendrix's house.

Arrests

Valenzuela was arrested on December 23, 2011, on another charge. He had items linked to Hendrix in his possession.

Rubio was arrested on December 27, 2011, wearing a black hoodie, which tested positive for gunshot residue.

Soto and Rogers were arrested on January 5, 2012.

DISCUSSION

Robbery and Burglary Special Circumstances

Defendants contend that the evidence was insufficient to support the jury's true findings on the robbery and burglary special circumstances because there was insufficient

evidence that they were major participants in the underlying felonies or that they acted with reckless indifference to human life. The prosecution conceded at trial that defendants did not intend to kill, and the Attorney General does not argue otherwise on appeal.

Standard of Review

"When reviewing a challenge to the sufficiency of the evidence, we ask '"whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' [Citations.] Because the sufficiency of the evidence is ultimately a legal question, we must examine the record independently for '"substantial evidence—that is, evidence which is reasonable, credible, and of solid value"' that would support a finding beyond a reasonable doubt. [Citation.] These same standards apply to challenges to the evidence underlying a true finding on a special circumstance. [Citation.]" (*People v. Banks* (2015) 61 Cal.4th 788, 804 (*Banks*).)

Felony-Murder Special Circumstances

In order to find the robbery and/or burglary special circumstance to be true, the jury was required to find "[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit" robbery (§ 190.2, subd. (a)(17)(A)) and/or burglary (§ 190.2, subd. (a)(17)(G)). "[E]very person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of [an enumerated] felony [including robbery and burglary,] which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of

parole . . . ." (§ 190.2, subdivision (d); see *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1753.)

In *Banks*, *supra*, 61 Cal.4th at page 798, our Supreme Court explained that the language of section 190.2 "imposes both a special actus reus requirement, major participation in the crime, and a specific mens rea requirement, reckless indifference to human life." The *Banks* court discussed in depth the United States Supreme Court cases *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*), and *Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*), noting that "[s]ection 190.2[,] [subdivision] (d) was designed to codify the holding of *Tison v. Arizona* (1987) 481 U.S. 137 which articulates the constitutional limits on executing felony murderers who did not personally kill. *Tison* and . . . *Enmund v. Florida* (1982) 458 U.S. 782, collectively place conduct on a spectrum, with felony-murder participants eligible for death only when their involvement is substantial and they demonstrate a reckless indifference to the grave risk of death created by their actions. Section 190.2[,] [subdivision] (d)[,] must be accorded the same meaning." (*Banks*, *supra*, at p. 794.) Although *Tison* and *Enmund* were death penalty cases, the *Banks* court held that "[s]ection 190.2[,] [subdivision] (d)[,] must be given the same interpretation irrespective of whether the defendant is subsequently sentenced to death or life imprisonment without parole." (*Banks*, *supra*, at p. 794.)

In *Enmund*, the earlier of the two Supreme Court cases, the defendant planned to rob Thomas Kersey after he discovered Kersey was in the habit of carrying large sums of money. Enmund drove two armed cohorts to the Kersey's home and waited in the car while they went inside. When Kersey's wife unexpectedly appeared with a gun, the robbers shot and killed both Kersey and his wife, took money from the house, and fled. Enmund drove the killers away from the scene of the crime and assisted them in disposing of their weapons. (*Bank*, *supra*, 61 Cal.4th at p. 799.) He was convicted of two counts of first degree murder and one count of robbery, and sentenced to death in both murder counts. (*Enmund*, *supra*, 458 U.S. at p. 785.) The Florida Supreme Court affirmed: "'[T]he only evidence of the degree of [Enmund's] participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of

the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money. The evidence, therefore, was sufficient to find that [Enmund] was a principal of the second degree, constructively present aiding and abetting the commission of the crime of robbery. This conclusion supports the verdicts of murder in the first degree on the basis of . . . felony murder . . . .' [Citation.]" (*Id.* at p. 786, fn. omitted.)

The United States Supreme Court reversed Enmund's death sentence, addressing the question of "whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life." (*Enmund*, *supra*, 458 U.S. at p. 787, fn. omitted.) The *Enmund* court held that "the Eighth Amendment bars the death penalty for any felony-murder aider and abettor 'who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.' (*Enmund*, [*supra*,] at p. 797.) The intent to commit an armed robbery is insufficient; absent the further 'intention of participating in or facilitating a murder' (*id*. at p. 798), a defendant who acts as 'the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape' (*id*. at p. 788) cannot constitutionally be sentenced to death." (*Banks*, *supra*, 61 Cal.4th at p. 799.) The Supreme Court based its holding on the facts as found by the Florida Supreme Court, which had rejected the trial court's findings that Enmund had planned the robbery in advance and was himself one of the shooters. (*Enmund*, *supra*, at p. 786, fn. 2.)

In *Tison*, the United States Supreme Court again considered under what circumstances accomplices to felony murder may be sentenced to death. (*Tison*, *supra*, 481 U.S. at p. 138.) Brothers Ricky, Raymond, and Donald Tison assisted their father Gary Tison—who was serving a life sentence for killing a prison guard in a previous escape attempt—and his cellmate, also a convicted murderer, in a prison breakout. To effect the escape, the brothers entered the prison with a chest full of weapons, armed Gary Tison and the cellmate, and held prisoners and visitors at gunpoint. When the car they escaped in sustained a flat tire, Raymond flagged down a family with the intention of stealing their car. The men held the family at gunpoint. Raymond and Donald drove

the family into the desert in the Tisons' car, where Gary Tison and the cellmate ultimately shot and killed them. Ricky, Raymond, and the cellmate were later apprehended at a roadblock. Donald was killed, and Gary escaped to the desert where he died of exposure. (*Id*. at pp. 139-141.) "The trial court made findings that Ricky and Raymond's role in the series of crimes was '"very substantial"' and they could have foreseen their actions would '"create a grave risk of . . . death."' (*Id*. at p. 142.)" (*Banks*, *supra*, 61 Cal.4th at p. 800.) The Arizona Supreme Court denied relief.

The United States Supreme Court granted certiorari on the issue of whether the Tisons' death sentences were permitted by the constitution, although neither brother personally killed any of the victims or specifically intended to kill them. (*Tison*, *supra*, 481 U.S. at p. 138.) The court discussed felony murder participants as covering a spectrum, ranging from those like Enmund whose "degree of participation in the *murders* was so tangential that it could not be said to justify a sentence of death," (*id.* at p. 148) and for whom there was no proof of a culpable mental state, to the felony murderers who "actually killed, attempted to kill, or intended to kill" (*id*. at p. 150). Because the court accepted the brothers' assertion that neither of them "took any act[ion] which he desired to, or was substantially certain would, cause death[,]" the brothers fell somewhere in the gray area between these two extremes. (*Id*. at p. 150.)

The Supreme Court recounted the Tison brothers' participation as follows: "Raymond Tison brought an arsenal of lethal weapons into the Arizona State Prison which he then handed over to two convicted murderers, one of whom he knew had killed a prison guard in the course of a previous escape attempt. By his own admission he was prepared to kill in furtherance of the prison break. He performed the crucial role of flagging down a passing car occupied by an innocent family whose fate was then entrusted to the known killers he had previously armed. He robbed these people at their direction and then guarded the victims at gunpoint while they considered what next to do. He stood by and watched the killing, making no effort to assist the victims before, during, or after the shooting. Instead, he chose to assist the killers in their continuing criminal endeavors, ending in a gun battle with the police in the final showdown. [¶] Ricky

Tison's behavior differs in slight details only. Like Raymond, he intentionally brought the guns into the prison to arm the murderers. He could have foreseen that lethal force might be used, particularly since he knew that his father's previous escape attempt had resulted in murder. He, too, participated fully in the kidnapping and robbery and watched the killing after which he chose to aid those whom he had placed in the position to kill rather than their victims." (*Tison*, *supra*, 481 U.S. at pp. 151-152.)

The Supreme Court concluded that "[t]hese facts not only indicate that the Tison brothers' participation in the crime was anything but minor; they also would clearly support a finding that they both subjectively appreciated that their acts were likely to result in the taking of innocent life." (*Tison*, 481 U.S. at p. 152.) The court refused to "precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty," holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." (*Id*. at p. 158, fn. omitted.) The *Tison* court remanded for the Arizona courts, which had found the Tisons were major participants in the underlying felonies, to determine whether the brothers had acted with reckless indifference to human life. (*Ibid*.)

With *Enmund* and *Tison* as a backdrop, the California Supreme Court set out to delineate the contours of section 190.2, and its application, under the circumstances in the *Banks* case, to Banks's codefendant Matthews. (*Banks*, *supra*, 61 Cal.4th at p. 797.) Matthews was the getaway driver in an attempted armed robbery that resulted in a killing. He participated in planning the robbery with two other gang members. (*Id*. at p. 796.) Matthews was not present at the attempted robbery and shooting and there was no evidence that he intended for the robbery to result in a killing (*id*. at pp. 805, 807), which appeared to have been a spontaneous response to resistance from the victim (*id*. at p. 807). The trial court sentenced Matthews to LWOP. (*Id*. at p. 794.)

The *Banks* court expounded on the conduct and mental state requirements of section 190.2, subdivision (d): "With respect to the mental aspect of culpability, *Tison*, and in turn section 190.2[,] [subdivision] (d), look to whether a defendant has

‘“knowingly engag[ed] in criminal activities known to carry a grave risk of death.”’ [Citation.] The defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed, demonstrating reckless indifference to the significant risk of death his or her actions create. There is an ‘apparent consensus [among the states] that substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty’ [Citation.]; accordingly, the death penalty may be applied to those who, like the Tisons, ‘subjectively appreciated that their acts were likely to result in the taking of innocent life’ [citation]. [¶] With respect to conduct, *Tison* and *Enmund* establish that a defendant’s personal involvement must be substantial, greater than the actions of an ordinary aider and abettor to an ordinary felony murder such as Earl Enmund. The defendants’ actions in *Tison v. Arizona, supra,* 481 U.S. 137 and *Enmund v. Florida, supra,* 458 U.S. 782 represent points on a continuum. (*Tison*, [*supra,* 481 U.S.] at pp. 149-151.) Somewhere between them, at conduct less egregious than the Tisons’ but more culpable than Earl Enmund’s, lies the constitutional minimum for death eligibility.” (*Banks*, *supra*, 61 Cal.4th at pp. 801-802.) The *Banks* court concluded that “[b]ecause the Supreme Court found it unnecessary to ‘precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty’ [citation], it follows that a jury presented with this question must consider the totality of the circumstances. The specific facts of the two cases illuminate the sort of considerations that may be relevant to a jury’s deliberations.” (*Banks*, *supra*, at p. 802.)

Under the particular facts in *Banks*, the California Supreme Court concluded there was insufficient evidence that Matthews was a major participant or that he acted with reckless indifference to human life for purposes of the special circumstance for an aider and abettor to felony murder under section 190.2, subdivision (d). (*Banks*, *supra*, 61 Cal.4th at pp. 805-811.) The *Banks* court listed several nonexclusive considerations that courts may take into account when evaluating a defendant’s culpability under the statute, including: “What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal

weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inactions play a particular role in the death? What did the defendant do after lethal force was used?" (*Id*. at p. 803, fn. omitted.) The court held that "felony murderers like [Mathews and] Enmund, who simply had awareness their confederates were armed and armed robberies carried a risk of death, lack the requisite reckless indifference to human life." (*Id*. at p. 809.)

Discussion

Soto contends her liability for Hendrix's murder was based solely on her role in aiding and abetting the robbery/burglary. She claims that evidence of her involvement was limited to setting up a meeting with Hendrix to buy drugs, driving her co-defendants to Hendrix's apartment, waiting in the car, and driving her co-defendants away from the scene. She was not present when Hendrix was fatally shot and did not have reason to believe that her co-defendants would shoot him.

Rogers argues that if we "take away" Berrones and Morgan's testimony and the suggestion that he personally intentionally discharged a firearm—which the jury rejected—his liability was solely based on his role in the robbery and his awareness that Rubio had at least one firearm. He argues that no evidence was presented regarding his actions at the time of the shooting, such that the evidence was insufficient to support the special circumstances.

The Attorney General concedes there was no plan to kill Hendrix prior to the robbery/burglary and that neither defendant intentionally caused Hendrix's death. She argues that defendants' substantial participation in the felonies and their reckless indifference to life support the jury's true findings.

With respect to Soto, we have no difficulty concluding that under the *Banks*

analysis there is insufficient evidence to support the finding that she was a major participant, or that her mental state rose to the level of reckless indifference to human life. From the evidence presented, it could reasonably be inferred that Soto knew Rubio was armed, arranged to buy drugs from Hendrix to enable her co-participants to gain entry, drove the robbers to Hendrix's apartment, waited for them in her car, and acted as the getaway driver. There was no evidence presented to indicate that she masterminded the robbery, that she was present at the scene of the robbery or the shooting, or that she heard the shooting or had any reason to know Hendrix had been shot prior to leaving the scene. The evidence does not indicate Soto was in a position to anticipate or prevent the murder, or to aid Hendrix after the shooting. The facts as to Soto are too close to those in *Banks* to uphold a conclusion that she was a major participants or that she acted with reckless indifference to human life. We modify Soto's sentences by striking the LWOP term and replacing it with a term of 25 years-to-life in state prison, the punishment for first degree felony murder. (See §§ 189, 190, subd. (a); *People v. Scott* (1994) 9 Cal.4th 331, 354 [an appellate court may modify unauthorized sentence on its own motion].)

The evidence of Roger's role as a major participant differs from Soto. Rogers was present in Hendrix's home at the time of the robbery, and personally facilitated its commission by struggling with Hendrix over the gun before Hendrix was killed. Rogers certainly knew that multiple firearms were present, Hendrix was outnumbered, and his death was the result of his refusal to submit to the robbery. These facts fall much closer to the *Tison* end of the continuum of the *Enmund*/*Tison*/*Banks* analysis. We conclude substantial evidence supports a finding that Rogers was a major participant in the robbery/murder.

In determining whether Rogers "exhibited 'reckless indifference to human life' within the meaning of section 190.2, subdivision (d), we look to whether the prosecution has introduced sufficient evidence of 'reasonable, credible, and of solid value' to 'support a finding beyond a reasonable doubt' that [defendant] had the requisite mental state. (*Banks, supra,* 61 Cal.4th at p. 804.)" (*People v. Clark* (2016) 63 Cal.4th 522, 618 (*Clark*) [post-*Banks* authority expanding on the analysis of reckless indifference to

human life].) We address the issue in light of the outline provided in *Clark*, recognizing that "[n]o one of these considerations is necessary, nor is any one of them necessarily sufficient." (*Banks*, *supra*, 61 Cal.4th at p. 803.)

Reckless indifference is not established by a defendant's awareness that a gun will be used in a felony, but it is a factor to be considered, and a defendant's use of a gun "can be significant to the analysis of reckless indifference to human life." (*Clark*, *supra*, 63 Cal.4th at p. 618.) Here the evidence showed the presence of at least two guns at the scene—the .22 caliber rifle and .38 or .357 handgun—and while there is no express evidence Rogers possessed these weapons, there is evidence he struggled with Hendrix over a gun and multiple gunshots were fired at some point during the offenses.

Physical presence at the scene and opportunity to prevent the crime or aid the victim are additional factors.[10] (*Clark*, *supra*, 63 Cal.4th at p. 619.) According to *Clark*, "[i]n *Tison*, the high court stressed the importance of presence to culpability." (*Ibid*.) Presence at the location of the killing provides an opportunity to act as a restraining influence, and the further opportunity to render aid to the injured victim. (*Ibid*.; *Tison, supra*, 481 U.S. at p. 141 [noting the Tison brothers failure to make an effort to help the victims].) Rogers in this case was present at the scene, it was obvious that others were armed; he struggled with the victim over a gun, rendered no aid to Hendrix after the shooting, hid Soto's car, and possibly disposed of evidence in a cloth grocery bag he was seen carrying. This conduct provides a window into both Rogers's conduct and mental state, which point to his involvement as a major participant and his reckless indifference to human life.

The next factor set forth in *Clark* in evaluating the existence of reckless indifference to human life is the duration of the felony. For example, "[t]he Tisons, the high court noted, 'guarded the victims at gunpoint while [the group of perpetrators] considered what next to do.' (*Tison, supra,* 481 U.S. at p. 151.)" (*Clark*, *supra*, 63 Cal.4th at p. 620.) "The duration of the interaction between victims and perpetrators is

[10] "At the same time, physical presence is not invariably a prerequisite to demonstrating reckless indifference to human life." (*Clark*, *supra*, 63 Cal.4th at p. 619.)

therefore one consideration in assessing whether a defendant was recklessly indifferent to human life." (*Ibid.*) The duration of the robbery of Hendrix is not clear from the record, other than that Hendrix resisted and at some point he struggled over a gun with defendant. Given this record, we cannot say the meager evidence of the duration of the robbery of Hendrix suggests Rogers acted with reckless indifference.

The *Clark* court next looked to the defendant's knowledge of a cohort's likelihood of killing. "A defendant's knowledge of factors bearing on a cohort's likelihood of killing [is] significant to the analysis of reckless indifference to human life. Defendant's knowledge of such factors may be evident before the felony or may occur during the felony. *Tison,* for example, emphasized the fact that the Tison brothers brought an arsenal of lethal weapons into the prison which they then handed over to two convicted murders [*sic*], one of whom the brothers knew had killed a prison guard in the course of a previous escape attempt. (*Tison, supra,* 481 U.S. [at p.] 151.)" (*Clark, supra,* 63 Cal.4th at p. 621.) "The facts in *Tison* also indicate that the Tison brothers had advance notice of the possibility that their father would shoot the family because, in response to one of the victim's pleas not to be killed, the father stated that he 'was thinking about it.' (*Tison, supra,* 481 U.S. [at p.] 140.) A defendant's willingness to engage in an armed robbery with individuals known to him to use lethal force may give rise to the inference that the defendant disregarded a 'grave risk of death.' (*Tison, supra,* 481 U.S. at p. 157.)" (*Clark, supra,* at p. 621.) There is no evidence Rogers knew in advance if his cohorts had a propensity for violence. But unlike the defendant in *Clark,* who was across a parking lot during the first phase of the robbery, Rogers was present in Hendrix's home at the time of the robbery, was aware of the presence of guns, and personally participated by struggling with Hendrix over the gun. These facts are sufficient to increase Rogers' culpability.

We next look to a defendant's efforts to minimize the risks of the robbery, an issue of first impression discussed in *Clark, supra,* 63 Cal.4th at page 622: "We conclude that a defendant's apparent efforts to minimize the risk of violence can be relevant to the reckless indifference to human life analysis. If the evidence supports an argument that

defendant engaged in efforts to minimize the risk of violence in the felony, defendant may raise that argument and the appellate court shall consider it as being part of all the relevant circumstances that considered together go towards supporting or failing to support the jury's finding of reckless indifference to human life. But the existence of evidence that defendant made some effort to minimize the risk of violence does not, in itself, necessarily foreclose a finding that defendant acted with reckless indifference to human life." We see no evidence that Rogers attempted to minimize the risk of the robbery. He was part of a concerted effort involving multiple people to victimize Hendrix when he was alone in his home. If anything, Rogers's struggle over the gun with Hendrix increased the risk of harm to Hendrix. The jury could reasonably infer that Rogers subjectively understood that preventing Hendrix access to a firearm increased the danger to the victim. The jury could also conclude that objectively, Rogers's act of preventing Hendrix from defending himself from multiple armed intruders, under the circumstances presented, suggests a reckless indifference to human life.

After consideration of the factors set forth in *Clark*, we conclude substantial evidence supports the jury's finding that Rogers acted with reckless indifference to human life. Our conclusion is consistent with case law decided after *Banks* holding that aiders and abettors who do not intend to kill, but who are present during the course of a robbery, may be found to have acted with reckless indifference to human life. Our colleagues in Division Four have recently addressed this scenario in upholding an LWOP sentence, reasoning as follows:

"Following *Banks,* in *People v. Medina* (2016) 245 Cal.App.4th 778 [(*Medina*)], the appellate court found there was sufficient evidence to show an accomplice (Whitehead) who acted as armed backup for a robbery was a major participant and acted with reckless indifference to human life. Although Whitehead was not involved in planning the robbery, when he learned of the plan, he asked to go and participated fully. Whitehead left before the victim was shot, in order to drive the shooter's girlfriend away from the scene. When he heard the shooting, he returned to aid the shooter while making no effort to determine if anyone was injured or to offer aid. (*Id.* at pp. 792-793.)

"Here, there was substantial evidence that Estrada and Garcia were major participants and acted with reckless indifference to human life. (See *Banks, supra,* 61 Cal.4th at p. 804 [in reviewing sufficiency of evidence supporting special circumstance allegation, appellate court considers the record in light most favorable to the judgment].) Estrada was identified as the person who first proposed robbing Rosales. When she did so, she informed Gonzalez and Garcia that Rosales was a drug dealer who had been physically violent in the past. Thus, unlike in *Banks,* there was a substantial probability the robbery would result in resistance and the need to meet that resistance with deadly force. Estrada then set up the robbery by calling Rosales and asking him to meet her at the laundromat. Her act of luring Rosales to the laundromat was 'critical to the robbery's success.' ([*People v.*]*Lopez* [(2011)] 198 Cal.App.4th [1106,] 1117.) Estrada also was identified as being at the scene, and pointing Rosales out to the shooter. [Fn. omitted] After a shot was fired, she neither called 911 to assist the victim, nor called the police to report the shooting. [Fn. omitted] . . . Estrada spent the afternoon with the shooter. She took Gonzalez to her home to introduce him to her son, and was arrested with him later that evening. On this record, there was sufficient evidence for the jury to find that Estrada was a major participant and acted with reckless indifference to human life.

"Likewise, Garcia was present when Estrada proposed robbing Rosales and described his violent nature. There was evidence he participated in the planning of the robbery with Estrada and Gonzalez and volunteered to assist as a lookout. His phone records showed calls to Rosales shortly before the murder. Garcia was present at the scene, 'in a position to facilitate or prevent the actual murder.' (*Banks, supra,* 61 Cal.4th at p. 803.) He made no attempt to prevent the shooting or to notify authorities after Rosales was shot. . . . Garcia chose to flee with the shooter, rather than come to Rosales's aid or summon help. He also accompanied Gonzalez when he disposed of the murder weapon. On this record, we find sufficient evidence to support the jury's findings that Garcia was a major participant and acted with reckless indifference to human life." (*People v. Gonzalez* (2016) 246 Cal.App.4th 1358, 1384-1386 (*Gonzalez*).)

The facts of each case are unique, and as our Supreme Court observed in *Banks*,

the presence or absence of any one factor is not necessarily determinative of whether a defendant acted with reckless indifference to human life. Rogers was a member of a group that intended to commit an armed robbery of a known drug dealer, a situation teeming with the likelihood of violence beyond the robbery. Unlike the defendants in *Enmund* and *Banks*, but like the defendants in *Medina* and *Gonzalez*, Rogers was present at the time of the robbery and killing. Significantly, Rogers precipitated the killing by struggling with the Hendrix over a gun. According to Berrones, the victim "didn't want to give up his shit so they shot him . . . ." According to others involved in the crime, Rogers "was down" and "had heart," a state of mind consistent with reckless indifference to human life. Rogers did nothing to aid the victim or notify law enforcement. To the contrary, Rogers told Morgan the robbery had gone badly and they ended up shooting Hendrix, he fled with others and hid the getaway vehicle, and likely had a hand in disposing of incriminating evidence. We are satisfied Rogers acted as a major participant in the robbery/murder, and that he did so with reckless indifference to human life.

Parole Revocation Fines

Soto's contention that the parole revocation fines imposed inaccurately reflect the trial court's pronouncement of judgment is moot. Because the trial court imposed a restitution fine of $7,500 under section 1202.4, imposition of a parole revocation fine in the same amount is mandatory under section 1202.45, in light of our modification of Soto's sentence. (*People v. Rodriguez* (2000) 80 Cal.App.4th 372, 378.) Thus, the abstract of judgment reflects the proper fines with respect to Soto. As to Rogers, the parole revocation fine cannot be attached to an LWOP sentence and must be reversed. "When there is no parole eligibility, the fine is clearly not applicable." (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.)

Admission of Rubio's Statements Against Rogers

Rogers argues the trial court committed error under state law by admitting those portions of Rubio's statements to Berrones that inculpated Rogers in the murder. The statements at issue are that they went there to rob Hendrix but he did not "want to give his shit up" so they shot him. Two guys went in—Rubio and a White guy named Jeremy or Josh. Rubio said that Rogers "is down now" and "he's got heart." Berrones said that Rubio told him "we killed" Hendrix. Rogers contends that Rubio's statements describing Rogers's involvement in the robbery/murder are inadmissible hearsay, and the trial court erred in admitting the entirety of the statement under the declaration against penal interest exception to the hearsay rule. (Evid. Code, § 1230.) Rogers concedes that admission of Rubio's statements was not prejudicial as to his first degree murder conviction, but he argues prejudice is shown as to the special circumstance finding. Finally, recognizing that defense counsel at trial did not make a specific objection on the ground asserted at the second trial, defendant argues the claim is not forfeited because counsel was ineffective in failing to object.

Evidence Code Section 1230 and the Standard of Review

"Although hearsay statements are generally inadmissible under California law (Evid. Code, § 1200, subd. (b)), the rule has a number of exceptions. One such exception permits the admission of any statement that 'when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.' (Evid. Code, § 1230.) As applied to statements against the declarant's penal interest, in particular, the rationale underlying the exception is that 'a person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement against that interest,' thereby mitigating the dangers usually associated with the admission of out-of-court statements. (*People v. Spriggs* (1964) 60

Cal.2d 868, 874.) [Fn. omitted]

"To demonstrate that an out-of-court declaration is admissible as a declaration against interest, '[t]he proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611 (*Duarte*).) 'In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' (*People v. Frierson* (1991) 53 Cal.3d 730, 745.)

"We review a trial court's decision whether a statement is admissible under Evidence Code section 1230 for abuse of discretion. (*People v. Lawley* (2002) 27 Cal.4th 102, 153, citing *People v. Gordon* (1990) 50 Cal.3d 1223, 1250-1253 (*Gordon*).) Whether a trial court has correctly construed Evidence Code section 1230 is, however, a question of law that we review de novo. [Citations.]" (*People v. Grimes* (Aug. 22, 2016, S076339) __Cal.4th __, ___ (*Grimes*) [2016 WL 4434808, 6-7].)

The *Grimes* court reviewed application of Evidence Code section 1230 to statements that inculpate a third party defendant. "The question in [*People v.*] *Leach* [(1975) 15 Cal.3d 419, (*Leach*)] concerned the admissibility of coconspirators' extrajudicial confessions implicating other defendants in a murder plot, which the prosecution introduced as, inter alia, declarations against penal interest. (*Leach*, *supra*, 15 Cal.3d at pp. 428, 438.) This court concluded that to the extent the confessions contained collateral assertions that inculpated the defendant, rather than the confessor, the statements were inadmissible. (*Id.* at pp. 441-442.)" (*Grimes*, *supra*, ___Cal.4th at p. ___ [2016 WL 4434808, at 6-7].) "We have applied *Leach* to bar admission of those portions of a third party's confession that are self-serving or otherwise appear to shift responsibility to others. [Citations.] But we have permitted the admission of those portions of a confession that, though not independently disserving of the declarant's

penal interests, also are not merely 'self-serving,' but 'inextricably tied to and part of a specific statement against penal interest.' (*People v. Samuels* (2005) 36 Cal.4th 96, 120-121 (*Samuels*) [upholding the trial court's admission of declarant's assertion that the defendant had paid him to kill the victim, and rejecting the argument that the reference to the defendant 'should have been purged,' where the statement in question was 'in no way exculpatory, self-serving, or collateral].) In *Samuels*, we applied the *Leach* rule to admit evidence that inculpated the defendant." (*Grimes*, *supra*, at p. ___ [2016 WL 4434808, at 9].)

Analysis

Rogers failed to object on the grounds asserted on appeal to introduction of the evidence in dispute at the second trial. "[N]umerous decisions by this court have established the general rule that trial counsel's failure to object to claimed evidentiary error on the same ground asserted on appeal results in a forfeiture of the issue on appeal. (*People v. Partida* (2006) 37 Cal.4th 428, 433-435; *People v. Lewis* (2001) 26 Cal.4th 334, 357.)" (*People v. Dykes* (2009) 46 Cal.4th 731, 756.) Seeking to avoid forfeiture, Rogers argues he received ineffective assistance of trial counsel, however the appellate record contains no explanation by counsel for the failure to object, and the issue is therefore properly reviewed by means of a petition for writ of habeas corpus. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; *People v. Wilson* (1992) 3 Cal.4th 926, 936; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

Assuming the issue is properly before this court, we conclude there was no error under state law. Rubio's statements to Berrones that Rogers "is down now" and "has heart" were in no sense self-serving, nor did they attempt to shift the blame to Rogers. (See *Samuels*, *supra*, 36 Cal.4th at p. 121.) Rubio freely admitted his role in Hendrix's murder, and his statements explained how Rogers played an integral role in the crime. The robbery/murder of Hendrix was perpetrated through the actions of multiple individuals, and the joint action of Rubio and Rogers was "inextricably tied to and part of

a specific statement against penal interest." (*Id.* at p. 122.) Because Rubio's statements are "specifically disserving" to himself, they satisfy "the trustworthiness requirements of Evidence Code section 1230 as interpreted by the Supreme Court in the *Leach* case. The fact that the statement is also disserving to [Rogers] does not render the statement unreliable and inadmissible." (*People v. Wilson* (1993) 17 Cal.App.4th 271, 276.)

Reasonable Diligence in Production of Witnesses

Soto argues that the trial court failed to require the prosecutor to demonstrate he used reasonable diligence to procure the attendance of witnesses Urquidez and Saracione at trial. We conclude the trial court properly ascertained that the prosecution exercised reasonable diligence to ensure the witnesses' availability.

Proceedings

Urquidez and Saracione testified in defendants' first trial, in which a mistrial was declared. The court denied defendants' motions to dismiss the prior proceedings pursuant to Penal Code section 1385 on August 8, 2014. Retrial was set to begin on February 17 or 18, 2015.

On February 17, 2015, the prosecutor indicated that he might not be able to proceed due to the "nature" of witnesses Morgan, Urquidez, and Saracione, who had not been located. The prosecutor explained that the witnesses were not under subpoena, and had not been under subpoena at the time of the first trial. He represented that it was "lucky that some of them were in custody and others Detective Anderson was able to pick up when we needed them and locate them." He added: "Frankly, even if these witnesses were under subpoena, I'm not sure they would show up to court."

On February 18, 2015, the court denied the prosecution's motion to continue the trial within the statutory period to allow for additional time to locate witnesses. Prior to the court's ruling, the prosecutor explained that: ". . . As is common in cases such as this

one, although I know this is technically not a gang case, . . . I think Rogers is a member of a gang, I think Rubio was a member of a gang and so was Valenzuela, and I would argue that . . . Soto is an associate. There has been evidence of witness intimidation, and the witnesses have been reluctant in this case. [¶] And so I think in these type of cases, where witness don't come forward, we often don't look for them until close until the trial date and just hope to sweep them up and bring them in, and with Mr. Morgan . . . we have the benefit of him actually having a warrant, because, frankly, I don't think he would come voluntarily." The court denied the motion for administrative reasons, but noted that the search for Morgan had not begun until February, which it considered to be late given that Morgan had had an outstanding warrant for several months.

A due diligence hearing was held later that day. Detective Todd Anderson testified that beginning in mid-January he searched the wanted person's criminal history and LexisNexis databases to locate possible addresses and phone numbers for Urquidez. He also checked for her under the last name "Keith." In the two weeks before the hearing, he called four phone numbers associated with her, and discovered that several of the numbers were "no longer good." A person who spoke Spanish answered one of the numbers and "they have no idea who or what she's about." Detective Anderson personally checked an address in Glendale and two addresses in Tujunga. Urquidez no longer lived at any of the addresses and no one had seen or heard from her. The detective learned that Urquidez was homeless through citizen informants in the Tujunga/Sunland area, and that she was living in that general area. He verified that Urquidez was not in custody, although she had two outstanding traffic warrants.[11] He prepared a wanted person's flyer, which he distributed to the West Valley Bureau of the Los Angeles Police Department, and the Crescenta Valley Sherriff's Station. Detective Anderson spoke with Urquidez's grandmother, who also believed she was homeless. He learned that Urquidez's mother was in custody and he intended to talk to her on the day of the hearing or the following day. Detective Anderson believed that Urquidez had been homeless

[11] The car associated with the traffic warrants did not belong to Urquidez and had been "junked."

since before the start of the first trial. A crime analyst was conducting an in-depth database search for Urquidez, but no additional information had been discovered at the time of the hearing.

Detective Anderson began his "workup" of Saracione in mid-January. He discovered that Saracione had recently been taken into custody on a drug charge and released a few days later. He went to an apartment in Tujunga that Saracione listed as his address and knocked on the door on three occasions—once in the evening and a couple of times during the day—but no one answered. The detective believed that location was Saracione's grandmother's residence, and that he was not actually living there. In the more recent past Saracione had listed two addresses in Antelope Valley, which Detective Anderson checked as well. He knocked on the doors during daytime hours, but there was no answer. Detective Anderson placed several calls to Saracione's mother, who had been cooperative in the past, but she had not responded. The detective did not check to see if anyone in Rubio's former residence had contact with Saracione because he knew the house had been "flipped," and none of the former occupants lived there. Saracione had been "in and out of custody" and had always given addresses in Antelope Valley. Detective Anderson believed he was a transient. He planned to return to the Antelope Valley addresses either that evening after the hearing or the next morning, and to enlist the services of the District Attorney Investigator to assist.

Detective Anderson testified that both Urquidez and Saracione reported being threatened on multiple occasions. Saracione was "definitely in fear for his life." Saracione had been uncooperative when Detective Anderson picked him up for the preliminary hearing. During the hearing he threatened to leave several times. He was so angry that the detective was concerned "it was going to turn physical." Urquidez had also been uncooperative. "[She told the detective] numerous times that she's been threatened and she does not want to have anything to do with this and she will not -- she wouldn't be here unless she was in custody." Detective Anderson also testified that at the time of the preliminary hearing in 2012, "Word got back to [Urquidez's] family that she was testifying in this case, and they felt her life was in danger and was endangering her

child, and . . . [she had] her child moved out of state."

A six-person surveillance team had been searching for Urquidez as of a week before the hearing, and Detective Anderson planned to have them look for Saracione as well, because he had been proven to be more difficult to find than expected. On the day of the hearing a team was searching for Urquidez in a homeless encampment in the Sunland/Tujunga area. An analyst was also searching for Urquidez on Facebook, as she was known to use the social networking site.

Detective Anderson explained why he did not "ramp up efforts" to find either witness until January: "I like to try to keep tabs on people. I was not actively looking and searching for them, because I do like to find where they might be, if they're in custody or if some addresses might get changed or something like that, and I don't like to start looking for people too far out in advance of court cases, and especially cases like this, because when they find out you're looking for them, they get in the wind." Detective Anderson did not leave his card when he looked for witnesses like Urquidez and Saracione. He explained, "I definitely don't want someone to know I've been looking for them. That would give them a double chance to split and make it even harder [to find them]." In his experience, when a witness has previously been uncooperative, "if you let them know that you're looking for them in any kind of advance, they're definitely going to make themselves hard to find."

The due diligence hearing continued the next day. Investigator Lawrence Arnwine testified regarding his efforts to find Urquidez and Saracione, which had commenced at 7:00 a.m. on the previous day. Arnwine searched for information regarding Urquidez under both of her last names in the Consolidated Criminal History Reporting System (CCHRS) and the California Law Enforcement Telecommunications Systems (CLETS). These databases allowed him to check criminal history, rap sheets, and wanted persons nationwide. Nothing in the databases indicated that she was in custody. He checked with the probation department, which informed him that she was on summary probation. He also contacted the parole office, but there were no records on file for Urquidez there. Arnwine checked the inmate locator and learned that she was not in custody. There were

no records on file for her at the California State Correctional Facility. He spoke with the Los Angeles County Coroner's Office, which also had no records for Urquidez. Arnwine checked four hospitals in the San Fernando Valley area, none of which had any record of her. He checked with the homeless facilities in the area, but was told that he could only get information through the central database in person, which he was unable to do the day before the hearing. He planned to follow up after the hearing. Arnwine checked the "T.L.O." or TransUnion site which tracks purchases made with credit and debit cards, including cell phone purchases, and utility payments. Through the T.L.O. database, Arnwine learned that Urquidez had a social media site. He attempted to contact her through the site, but had not received a response.

With respect to Saracione, Arnwine searched the CCHRS and CLETS databases, and found no records indicating that he was in custody. He checked with the probation department. Its records indicated that Saracione's probation had been terminated on September 3, 2013. He contacted Saracione's former probation officer. She indicated that he had last lived in Lancaster. Arnwine visited a Sunland address associated with Saracione and talked with a relative who told him Saracione had moved out several weeks earlier. The relative offered to contact Saracione to help locate him. Arnwine visited another relative, but that person was estranged from Saracione, and had no information about him. Later in the day, Saracione called Arnwine and advised him that he knew nothing about a court case, and told him to "catch me if you can." Arnwine continued to search for Saracione at another location. He sent an investigator to a Sunland location, but the people who lived at the address had been there two years and had never seen Saracione. He sent another investigator to three locations in Lancaster. One of the residences was empty with a realtor's lock on the door. The residents at the second location had never seen Saracione. The third location was an "AB109 home."[12] The resident caretaker believed that Saracione was living on the streets or in a homeless facility. Arnwine investigated local homeless facilities, but there were no records on file

[12] "AB109 housing" is transitional housing for post release community supervision probationers following realignment.

for Saracione. The coroner's office also had no records on file for him. The parole office had no records for Saracione. Arnwine found three phone numbers associated with Saracione on the TransUnion site, but when he called none of them were his. Arnwine obtained four e-mail addresses for Saracione on a social media site and attempted to contact him, but did not receive a response.

The court ruled the prosecution had acted with due diligence in attempting to locate both Urquidez and Saracione under Evidence Code 240. It noted that the uncooperativeness of the witnesses "cut[] two ways." The prosecutor must make greater efforts when a witness is known to be reluctant, but the difficulty of finding such a person must also be taken into account. Factoring in that the witnesses were transient and did not want to be found, the court concluded that sufficient efforts were made. It also concluded that the search was timely, because the detective had begun three weeks prior to trial. The court noted that although the investigator had just commenced his efforts, "he certainly ran the right databases and did the things that could be done," and all possible leads had been explored. The prosecutor added that he believed when Detective Anderson returned he would confirm that he and two other patrol officers spotted Urquidez at a homeless encampment the night before, but were unable to "chase her down."

Defense counsel objected to the ruling, arguing that the prosecution failed to act with due diligence despite the knowledge that the witnesses were uncooperative. The detective should have searched for Urquidez and Saracione earlier and kept them under surveillance. The court responded that there were significant logistical impediments to conducting surveillance on transients, and particularly transients who did not want to cooperate. It did not change its ruling.

Due Diligence and the Sixth Amendment

"'A criminal defendant has the right under both the federal and state Constitutions to confront the witnesses against him [or her]. (U.S. Const., 6th Amend.; Cal. Const., art.

I, § 15.) This right, however, is not absolute. The high court . . . reaffirmed the long-standing exception that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."' (*People v. Wilson* (2005) 36 Cal.4th 309, 340 [(*Wilson*)], quoting *Crawford v. Washington* [(2004)] 541 U.S. [36,] 59.) 'Evidence Code section 1291 codifies this traditional exception.' (*People v. Wilson*, *supra*, 36 Cal.4th at p. 340.) 'When the requirements of Evidence Code section 1291 are met, "admitting former testimony in evidence does not violate a defendant's right of confrontation under the federal Constitution. [Citations.]"' (*Ibid.* quoting *People v. Mayfield* [(1997)] 14 Cal.4th [668,] 742.) [¶] 'Evidence Code section 1291, subdivision (a)(2), provides that former testimony is not rendered inadmissible as hearsay if the declarant is "unavailable as a witness," and "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." . . . Evidence Code section 240, subdivision (a)(5), provides that a declarant is "unavailable as a witness" if [he or she] is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process."' (*People v. Wilson*, *supra*, 36 Cal.4th at p. 341.)" (*People v. Friend* (2009) 47 Cal.4th 1, 67-68.)

Reasonable diligence requires "'persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citations.]' [Citation.]" (*Wilson*, *supra*, 36 Cal.4th at p. 341.) The factors to be considered in determining whether the proponent has exercised due diligence "include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored." (*Ibid*.) They also include "'whether the witness would have been produced if reasonable diligence had been exercised [citation].' [Citation.]" (*People v. Sanders* (1995) 11 Cal.4th 475, 523.) However, reasonable diligence "'requires only reasonable efforts, not prescient perfection.' [Citation.]" (*People v. Diaz*

(2002) 95 Cal.App.4th 695, 706 (*Diaz*).) The People are not required "'to keep "periodic tabs" on every material witness in a criminal case.' [Citation.]" (*Wilson*, *supra*, at p. 342.) They cannot take witnesses into custody long before trial begins in order to ensure their presence at trial, nor can they effectively prevent witnesses from leaving the state or disappearing long before trial if the witnesses plan to do so. (*People v. Hovey* (1988) 44 Cal.3d 543, 564 (*Hovey*); *Diaz*, *supra*, at p. 706.) "'That additional efforts might have been made or other lines of inquiry pursued' [citation]" does not preclude a finding of reasonable diligence. (*Wilson*, *supra*, at p. 342.) It is sufficient if the prosecutor has made reasonable efforts to locate a witness. (*Ibid*.)

We independently review the trial court's determination that the prosecution's efforts to locate an absent witness were reasonable. (*People v. Cromer* (2001) 24 Cal.4th 889, 901.)

Discussion

Soto argues that the prosecution failed to make reasonable efforts to locate Urquidez and Saracione because it did not "'take adequate preventative measures to stop the witnesses from disappearing'" in the time between the initial trial and the retrial, and because the efforts to locate the witnesses were unreasonably delayed. Our review of the record reveals no error in the court's ruling.

The parties are in agreement that both witnesses were methamphetamine addicts and transients, who had previously been uncooperative. The witnesses had been threatened, and both feared for their safety and/or the safety of family members. There was no doubt that Urquidez and Saracione would, at the very least, be reluctant witnesses, and that there was a likelihood they would go into hiding to avoid testifying. As the trial court noted, however, this information cuts both ways. When the prosecutor "know[s] of a substantial risk that [an] important witness [will] flee" he or she is required to "take adequate preventative measures." (*Hovey*, *supra*, 44 Cal.3d at p. 564.) At the same time, giving a reluctant witness advance warning can be counterproductive,

ensuring that the witness will leave the area to avoid testifying. (See *Diaz*, *supra*, 95 Cal.App.4th at p. 707.)

In *Diaz*, the Court of Appeal held there was no error in the admission of prior testimony where evidence was presented that an experienced officer who was familiar with the witness and aware that she would not cooperate made a tactical decision to subpoena her on the day she was to testify, but was unable to locate her. (*Diaz*, *supra*, 95 Cal.App.4th at p 707.) Like the officer in *Diaz*, Detective Anderson displayed a thorough understanding of both witnesses' prior behavior and attitudes toward testifying in this case, and familiarity with their life circumstances. He "like[d] to try and keep tabs on people," but chose not to "ramp up" his search for Urquidez and Saracione until about a month prior to the hearing because he believed it was likely that they would hide, making it even more difficult for him to find them. He testified that he made it a practice not to leave his card with people he spoke to in cases like this where there was a substantial likelihood that a witness would flee, because it would do nothing more than announce that he was looking for them, giving them the opportunity to disappear "in the wind."

The detective's instincts were correct. When officers approached Urquidez—who had previously said that she wanted nothing to do with the case and would only testify if she was in custody—she immediately ran and successfully evaded them. When Saracione learned that there was a court case, he called Detective Anderson and told him to "catch me if you can," expressing his determination not to testify. Had the detective sought out the witnesses earlier and alerted them to the trial date, "it is unclear what effective and reasonable controls the People could impose . . . ." (*Hovey*, *supra*, 44 Cal.3d at p. 564.) They could not take Urquidez and Saracione into custody months before trial to ensure their presence, nor could they prevent them from going into hiding or leaving the state. (*Ibid*.; *Diaz*, *supra*, 95 Cal.App.4th at p. 706.) As the trial court pointed out, periodic surveillance of transients differs substantially from surveillance of persons who have homes they return to daily. A transient's movements are not predictable. Officers cannot simply stake out a specific location at regular intervals. The efforts required to keep "periodic tabs" on a transient on even a weekly basis would be

prohibitively burdensome. (See *Hovey*, *supra*, at p. 564.) Detective Anderson's best chance of procuring Urquidez and Saracione to testify was to catch them unaware in the weeks before trial, when they would have less time and opportunity to make themselves unavailable. The detective's determination not to keep "periodic tabs" on Urquidez and Saracione and to wait until a month before trial to secure their testimony was consistent with the prosecution's duty to use reasonable diligence to procure their witnesses. The trial court did not err in deeming Urquidez and Saracione unavailable and admitting their testimony from the first trial.

Ineffective Assistance of Counsel

Soto argues that her trial counsel rendered ineffective assistance by failing to act with due diligence to secure the attendance of Nadine Gonzalez and Rita Dunn, who testified for the prosecution in the first trial. Because she cannot establish prejudice, Soto's claim necessarily fails.

Relevant Prior Testimony

Gonzalez

In defendants' prior trial, Gonzalez testified that Dunn and Hendrix were roommates. Dunn lived on the main floor, and Hendrix lived in a basement apartment that could be accessed from the back of the house. Gonzalez moved in with Dunn and Hendrix the day before Hendrix was killed. That night, she spent the evening in her room on the first floor talking with Dunn until about midnight, when Dunn left to go to a club. Hendrix left the house in Dunn's truck around dusk, and did not return until sometime between 2:00 a.m. and 3:00 a.m.

Sometime after Hendrix returned home, Gonzalez heard him talking to a girl. When she went down to his room about 10 minutes later, he was sitting at his computer.

Gonzalez noticed a lump in the bed that looked as if someone was under the covers. She bought methamphetamine from Hendrix, and stayed about five minutes. Gonzalez told Hendrix she needed to take the drugs to her mother's house across the street. He looked at her and said, "Please come right back." She thought this was strange, and offered for Hendrix to come upstairs with her, but he said, "No. Just come back." Gonzalez went over to her mother's house, and watched some TV with her brothers for a few minutes. Then she grabbed some food to take back to Dunn's house.

As Gonzalez walked back across the street, she heard what she later realized were three muffled gunshots. She noticed a car with its brake lights on, parked approximately four houses south at a bend in the road. The brake lights remained illuminated the entire time she observed the vehicle. She did not see anyone walking or running toward the vehicle, and the only portion of the vehicle that she could see was the brake lights. She could not see anyone inside the car. Gonzalez did not see or hear anyone leaving the house.

Gonzalez entered the house through the front door and heard about three more gunshots, which were much louder. She was so scared that she dropped everything she was holding. She could hear men arguing, but did not recognize any of the voices. Dunn had showed Gonzalez a shotgun that she kept in the house, and had told her that if anything happened she should use it to protect herself. Gonzalez grabbed the shotgun and went to the back door. She called Hendrix on his phone to see if he was alright. The call went to voice mail, so she opened the back door and walked down the stairs to his room. When she got there, both doors were wide open, and Hendrix's dogs were gone. Hendrix was face-down on the floor and no one else was around. Gonzalez ran over to Hendrix and pulled him up. She saw that he was bleeding, so she called her mother and told her to call the police. Gonzalez's father came over from across the street and told her to come home, but she would not leave Hendrix. Dunn returned to the house, and Gonzalez went upstairs with her briefly. While upstairs, she heard a car come up the street going north, turn around, and then drive away heading south. The paramedics arrived soon afterward. Gonzalez noticed several watches and a bag on the floor of

Hendrix's room, which had not been there the first time she visited him that evening.

On re-cross examination, Soto's counsel asked Gonzalez if she gave police a description of the vehicle she saw with its brake lights on. She testified that she told police she saw brake lights on a car down the road. Defense counsel asked if she told the police the vehicle was a black Impala, and she responded that she did not.

Dunn

Dunn testified that Hendrix lived in the basement apartment for approximately two months before he was killed. She identified a photograph of Soto as "Melissa." Soto had come to the house to visit Hendrix about six times in the two weeks before he died. Dunn last saw Soto visit Hendrix the morning before he was killed. Dunn identified a red Saturn as the car Soto usually drove when she came to see Hendrix.

On the night Hendrix was killed, she and Gonzalez spent the evening together socializing while Hendrix was out. Dunn went out to a club at around midnight, and stayed until approximately 2:30 a.m. Dunn stopped at a gas station on her way home at about 2:45 a.m., and called Gonzalez, who had called her while she was at the club. Gonzalez sounded normal when they spoke. About 20 to 25 minutes later, when Dunn was exiting the highway, she received a call from Gonzalez. She was hysterical and unintelligible. As she was nearing home, Dunn passed a car on Kagel Canyon Road that was "a very dark color." She could not be sure of the car's color, but assumed it was black with very dark tinted windows. She turned onto the street where she lived, pulled into her driveway, and got out. Gonzalez was outside, still hysterical. Hendrix was on the ground in the back. Dunn learned that the authorities had already been notified, so she went inside and waited for the police and ambulance to arrive.

Detective Anderson

On cross-examination, Soto's counsel asked Detective Anderson if Gonzalez gave

a statement to police at the scene regarding a vehicle. The prosecutor objected that the question called for speculation. Defense counsel responded that the testimony was not solicited for the truth of the matter asserted, but only to "see what [the] officer did next." The court overruled the objection. Counsel then asked if the "murder book," which the detective prepared as part of the investigation, contained a statement Gonzalez purportedly gave to an officer that she saw a black Impala or Honda. The question was also admitted to give context to the officer's actions, and not for the truth of the matter asserted. The detective responded that the statement was contained in the murder book. The court admonished the jury not to consider the response for its truth. Soto's counsel asked Detective Anderson if he followed up with Gonzalez and asked her to explain the statement. He responded that he did and that she could not recall what the vehicle looked like.

Proceedings

On February 17, 2015, the prosecutor informed the court and defense counsel that he did not intend to call Gonzalez and Dunn as witnesses in the retrial. The defense wished to call the witnesses, but they were not under subpoena. Rogers's counsel engaged an investigator to locate Gonzalez and Dunn. Soto's counsel relied on this investigator rather than retaining a separate investigator. The investigator was unable to locate either witness. On March 3 and 4, 2015, a due diligence hearing was held, and the trial court ruled that the defense had not met its burden of establishing the witnesses were unavailable. The investigator had not begun efforts to locate the witnesses until mid-trial, and had made very meager efforts.

After the jury returned its guilty verdict, Soto's counsel moved for new trial based on ineffective assistance of counsel.[13] Counsel stated that he should not have delegated the duty of finding the witnesses to Rogers's investigator, and that his client had been

[13] Rogers's counsel moved for new trial on the same basis.

prejudiced by their absence. Counsel believed that the witnesses were material and that their testimony would have been beneficial to the defense. The prosecution opposed the motion, arguing that defense counsel made a tactical decision, and that the witnesses were not material.

The court denied the motion for new trial, because the witnesses were not material, and the testimony they would have provided could have further implicated Soto in the crimes. The court also concluded defense counsel was not ineffective for relying on Rogers's investigator to secure the witnesses.

Law

Although it is not one of the statutorily enumerated grounds, a claim of ineffective assistance of counsel may be raised in a motion for new trial under section 1181. (*People v. Callahan* (2004) 124 Cal.App.4th 198, 209.) When, as here, the trial court has denied a motion for new trial based on an ineffective assistance claim, we apply the standard of review applicable to mixed questions of law and fact, upholding the trial court's factual findings to the extent they are supported by substantial evidence but reviewing de novo the ultimate question of whether the facts established demonstrate a violation of the right to effective counsel. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724-725.)

"'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components.' [Citations.] 'First, the defendant must show that counsel's performance was deficient.' [Citations.] Specifically, he must establish that 'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 216 (*Ledesma*), citing and quoting *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 (*Strickland*).) "In addition to showing that counsel's performance was deficient, a criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim." (*Ledesma*, *supra*, at p. 217.) With respect to the prejudice component, "[t]he defendant

must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, *supra*, at p. 694.) Moreover, "prejudice must be affirmatively proved. [Citations.] 'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding . . . .' [Citations.]" (*Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.)

"[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order [set forth above] or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland*, *supra*, 466 U.S. at p. 697.)

Discussion

Soto contends that if her trial counsel had secured Gonzalez and Dunn as witnesses, their testimony would have created doubt as to whether the getaway vehicle was the red Saturn she drove, and consequently created doubt regarding whether she was involved in the robbery. Soto's claim that she was prejudiced by her counsel's ineffective assistance is without merit. It is not reasonably probable that the outcome of the trial would have been more favorable to Soto if Gonzalez and Dunn had testified. Gonzalez was unable to see the make or color of the car she saw on Lakeview Terrace, and it would be speculative to conclude the car that passed Dunn on Kagel Canyon Road was the getaway vehicle.

Although Soto contends it is undisputed that Dunn testified she saw a black vehicle, and that Gonzalez told police she saw a black vehicle, the record belies both assertions. Gonzalez testified that she saw a car's brake lights some distance down the road south of the house. She could not see any other part of the car and denied

identifying the vehicle to police as a black Impala. The only admissible evidence Detective Anderson offered was his testimony that when he followed up with Gonzalez, she said she could not recall what the vehicle looked like. Detective Anderson did not take the statement attributed to Gonzalez in the "murder book" and had no personal knowledge of the interview. He could not have testified as to what Gonzalez said or did not say. The testimony was not offered for its truth, and the jury was admonished not to consider it for that purpose. Gonzalez also testified that she heard a car go north past the house, turn around further down the road, and then drive south after she found Hendrix downstairs.[14] Gonzalez did not see the car, and had no knowledge of its make or color.

Additionally, some of Gonzalez's testimony inculpated Soto. Gonzalez heard a woman's voice before she went down to Hendrix's room the first time. She said that when she was in Hendrix's room, there was a big lump in his bed, as if someone was under the covers. Hendrix asked Gonzalez to "Please come right back[,]" which struck her as odd. Despite this, he did not leave the room with her as she suggested. From these facts, the jury could draw the inference that Soto was in the room with Hendrix just before the shooting occurred, and that Hendrix was concerned about being left in the room, but was also afraid to leave.

Dunn testified that she saw a very dark-colored vehicle with dark-tinted windows that she *assumed* was black. It is speculative that the dark vehicle Dunn saw was the getaway car. She saw the vehicle on Kagel Canyon Road. She had no way of knowing whether the car had been on West Trails, where she and Hendrix lived, or had turned onto Kagel Canyon Road from another street. At least three people—Hendrix, Dunn, and Gutierrez—had driven vehicles on West Trails between 2:00 a.m. and 3:30 a.m. that day. There is no reason to believe that the car Dunn passed on Kagel Canyon Road when she was approaching West Trails was related to the robbery and not a random vehicle.

Dunn's testimony also inculpated Soto. Dunn linked Soto to the Saturn, and testified that she had seen her driving it about half a dozen times in the last couple of

[14] The vehicle whose brake lights she saw when crossing the street was facing south.

weeks before Hendrix was killed. Dunn's testimony also established that Hendrix and Soto had a greater connection than the typical drug dealer and buyer. Their relationship was not solely based on text messages and drug transactions. Soto had come to the house to see Hendrix on multiple occasions over the two weeks before his murder. It would be reasonable to infer that the two had a rapport, and that Hendrix would have been comfortable letting Soto into his room in the early morning hours, consistent with the prosecutor's theory that Soto "softened" Hendrix up and facilitated her companions' apparently unimpeded entry into his room.

It is not reasonably probable that the outcome of the trial would have been more favorable to Soto had Gonzalez and Dunn testified. The only witness who was able to identify a car leaving the scene was Gutierrez, who testified that the vehicle he saw was a dark red Saturn. Gutierrez also saw a man in a dark hoodie run toward the vehicle and get into the back seat, after which the Saturn quickly drove away. Other evidence bolstered Gutierrez's testimony. Rubio was arrested wearing a black hoodie that tested positive for gunshot residue. Urquidez testified that Soto left around the same time as Rogers, Rubio, and Valenzuela that night, and returned around the same time as the men did several hours later. Sams testified that Rubio told her Soto, Rogers, and Valenzuela were going to the robbery with him, and that Rogers left just after the other three left together. Urquidez also testified that she drove Soto and Rogers home after Rogers "hid" Soto's red Saturn a few blocks away. All of these facts support the conclusion that the car used in the robbery was Soto's. It is highly unlikely that the jury would entertain doubt regarding Gutierrez's testimony if Dunn had testified she passed a dark-colored car on a different road.

Cumulative Error

Soto contends that cumulative errors at trial deprived her of due process. As we have concluded that the trial court did not err, the contention necessarily fails. (See *People v. Hines* (1997) 15 Cal.4th 997, 1061.)

DISPOSITION

The robbery and burglary special circumstance findings as to Soto are reversed. The trial court is directed to resentence Soto to 25 years-to-life based on her conviction of first degree murder. We affirm Rogers's first degree murder conviction and the special circumstance findings, but direct the trial court to strike the parole revocation fine. The trial court is directed to prepare new abstracts of judgment reflecting these changes and forward the abstracts to the Department of Corrections and Rehabilitation.

KRIEGLER, Acting P.J.

We concur:

TURNER, P.J.

KUMAR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.